1982

Trilba A. Jones v. Sharon Colby Kiefer : Brief of Appellant

Utah Supreme Court

Robert J. Schumacher; Attorney for Appellant;
Wendell P. Ables; Attorney for Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

TRILBA A. JONES, Incompetent, by her Guardian Ad Litem, BONNIE JEWEL SHINER,	)	
Plaintiff/Respondent,	)	
vs.	)	Case No. 18339
SHARON COLBY KIEFER,	)	
Defendant/Appellant.	)	

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, JUAB COUNTY, STATE OF UTAH, THE HONORABLE J. ROBERT BULLOCK, JUDGE

ROBERT J. SCHUMACHER
Attorney at Law
81 East Center Street
Provo, Utah 84601

Attorney for Appellant

WENDELL P. ABLES
Attorney at Law
Suite 14, Intrade Building
1399 South 7th East
Salt Lake City, Utah 84105

Attorney for Respondent

IN THE SUPREME COURT OF THE

STATE OF UTAH

TRILBA A. JONES, Incompetent, by her Guardian Ad Litem, BONNIE JEWEL SHINER, Plaintiff/Respondent, vs. SHARON COLBY KIEFER, Defendant/Appellant.	)	Case No. 18339

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, JUAB COUNTY, STATE OF UTAH, THE HONORABLE J. ROBERT BULLOCK, JUDGE

ROBERT J. SCHUMACHER
Attorney at Law
81 East Center Street
Provo, Utah 84601

Attorney for Appellant

WENDELL P. ABLES
Attorney at Law
Suite 14, Intrade Building
1399 South 7th East
Salt Lake City, Utah 84105

Attorney for Respondent

TABLE OF CONTENTS

CITATIONS

STATUTES

RULES

CASES

IN THE SUPREME COURT OF THE

STATE OF UTAH

TRILBA A. JONES, Incompetent, by her Guardian Ad Litem, BONNIE JEWEL SHINER,	)	
Plaintiff/Respondent,	)	
vs.	)	Case No. 18339
SHARON COLBY KIEFER,	)	
Defendant/Appellant.	)	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff/Respondent brought action against Defendant/Appellant seeking to have certain deeds to real property held by defendant in the City of Nephi, Juab County, State of Utah, set aside, claiming that the first of these deeds was procured through fraud, duress, breach of fidicuary responsibility, and without fair and adequate consideration. The Plaintiff/Respondent further attacked the second deed claiming that the Defendant/Appellant took the property with knowledge of purported defects in the deed granting the property to her predecessor in interest, and that the grant of the property to Defendant/Appellant was without consideration.

DISPOSITION IN THE TRIAL COURT

The case was tried to the Court, the Honorable J. Robert Bullock, Judge, on December 8, 1981. Judgment was entered against defendant/appellant on January 8, 1982. A Motion for New Trial was filed and an Order denying relief thereunder entered on March 1, 1982. The judgment set aside and rendered null and void the deeds under which the defendant/appellant claimed interest in and held the subject property. The Notice of Appeal was filed on March 30, 1982.

RELIEF SOUGHT ON APPEAL

The defendant/appellant (hereinafter "appellant") requests that the judgment entered by the trial court be reversed and that the Supreme Court order the entry of judgment finding that the plaintiff/respondent (hereinafter "respondent") failed to meet the burden of proof required in the case, which would have the effect of reinstating the deeds set aside by the trial court's judgment and vest title to the subject property in appellant.

STATEMENT OF FACTS

Plaintiff, Trilba A. Jones, was, at the date of trial in the within case, a 77 year old widow (T 10), her husband having died in 1976. Mrs. Jones owned solely, after her husband's death, a home on certain real estate in Nephi, Juab County, Utah, more fully described as:

The North half of Lot 3, Block 30, Plat "B", Nephi Townsite Survey.

An abstract of title to the said property was received into evidence and showed, in relevant part, through a series of transactions the following:

(1) Grant L. Jones and Plaintiff, Trilba A. Jones were deeded the property in question on June 8, 1970;

(2) Trilba A. Jones granted the property to Millie Atkin Fordham Colby, by Warranty Deed, on March 3, 1978;

(3) Millie Colby granted the property to Sharon Colby Kiefer, Defendant/Appellant herein, by Warranty Deed on June 30, 1980. (Abstract of Title, Plaintiff's Exhibit - 2)

Mrs. Jones continued to live alone in the home after her husband's death until January 31, 1978, when, while working as a baby-sitter for neighbors she fell and fractured her leg. (T 12) She was hospitalized at Moutain View Hospital, Payson, Utah, from that date for approximately two months. (Medical Records, Plaintiff's Exhibit - 1) While at the hospital she was frequently visited by family members and friends, including her daughter, Millie Colby. The Deed of March 3, 1980, was executed by Mrs. Jones while she was in the hospital. (T 15)

Uncontested in the case was that the deeds of March 3, 1978, and June 30, 1980, transferring ownership of the subject property, respectively, to Millie Colby and then to Sharon Colby Kiefer were not purchases. It was further uncontested that the second deed was, legally, a gift. (T 88, 95)

Millie Colby did not live in the house after the date of the deed and died on April 3, 1981. (T71) After release from the hospital, Mrs. Jones lived in the subject home until illness forced her to enter a rest home. (T 22) Mrs. Jones was transferred to a

nursing home in Salt Lake City in late 1979. (T 23) Appellant moved to the house on June 13, 1981, and lived there continuously until trial. (T 85) A petition for appointment of Conservator based on incompetency of Trilba A. Jones was filed in the District Court of Salt Lake County. The conservatorship was denied. (T 54) No evidence was produced at the trial concerning a judicial decision on the incompetence of Mrs. Jones--whether based on physical disability or mental incapacity.

ARGUMENT

I

THE EVIDENCE FAILED TO REBUT THE PRESUMPTION OF VALIDITY INHERENT IN A DELIVERED, RECORDED DEED WITH CLEAR AND CONVINCING PROOF AND THE FOLLOWING FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE

The evidence established that the March 3, 1978, deed was delivered to Millie Colby at the time of its execution and subsequently recorded prior to the death of Mille Colby. (T 15, Abstract of Title, Plaintiff's Exhibit - 2) The evidence further established that the deed of June 30, 1980, granting the subject property to appellant was recorded. (Abstract of Title, Plaintiff's Exhibit - 2) The delivery and recordation of a deed gives rise, under the law, to certain presumptions and establishes a special burden of proof to be met by one trying to invalidate the deed. The presumption raised by the delivery of the deed is that of transfer of interest. In Allen v. Allen, 115 Utah 303, 204 P.2d 458 (1949), at 461, the Court stated:

> " * * * The recording of the deed and placing the names of others on the property is somewhat in the nature of a public declaration that she intended the instrument to become effective immediately. People as a rule do not deliberately put a flaw in the title to their

> property, thereby handicapping its later disposal, unless they really intend to transfer some interest to the person whose name is in the record."

The person who seeks to have a deed declared invalid must show proof greater than that normally required in a civil case. The person so asserting must show the invalidity by "clear and convincing evidence." Northcrest, Inc. v. Walker Bank and Trust Co., 122 Utah 268, 248 P.2d 692 (1952).

Another general principal of law applicable to this case must be stated as a preamble to appellant's argument: this being an action in equity, the reviewing court must make a determination of the facts.

> " * * * this action to avoid deeds is one in equity upon which this court has both the prerogative and the duty to review and weigh the evidence and determine the facts." Del Porto v. Nicolo, 495 P.2d 811 (Utah 1972) at 812.

The context of the case shifts that burden to the appellant herein, appellant having attacked by the appeal the findings of fact made by the trial court:

> "However, in the practical application of that rule it is well established in our decisional law that due to the advantaged position of the trial court, in close proximity to the parties and the witnesses, there is indulged a presumption of correctness of his findings and judgment, with the burden upon the appellant to show they were in error; and where the evidence is in conflict, we do not upset his findings merely because we may have reviewed the matter differently, but do so only if the evidence clearly preponderates against them." id.

It is the position of the appellant that the evidence produced at the trial clearly proponderated in the favor of the appellant and the judgment for respondent was not supported by

the evidence.

The Court made specific findings as follows:

(1) That the Incompetent did not have the requisite mental capacity to make a valid gift of her home and real property; or

(2) She did not know she was making a gift;

(3) That the Incompetent did not have the intent to convey the property to Millie Colby as her sole and separate property nor did she intend to make a gift of the property to Millie Colby to the exclusion of her rights and the rights of the other heirs;

(4) That Millie Colby exercised duress on the Incompetent in procuring the deed to the subject property;

(5) That persons who stood in fidicuary capacity to the Incompetent and who had a duty to tell her of the deed failed to do so;

(6) That the transfer from Millie Colby to Defendant/Appellant herein was without consideration.

A.

INCOMPETENCY OF TRILBA A. JONES, HER KNOWLEDGE OF THE NATURE OF THE DEED OF MARCH 3, 1978, AND HER INTENT TO CONVEY FEE OWNERSHIP TO MILLIE COLBY BY GIFT

The respondent attempted to show the incompetency of Trilba A. Jones on March 3, 1978, the date of the first deed, by introducing testimony from Mrs. Jones, herself, and from Bonnie Shiner. Also introduced was the medical record of Mrs. Jones' stay at Mountain View Hospital following the accident in which she broke

It is noteworthy in discussing the evidence produced at trial to show the incompetency of Mrs. Jones that no medical testimony was offered, even though the respondent had, at pre-trial confenence, given the names of physicians respondent would produce at trial to establish her incompetence. (Transcript of Pre-Trial Hearing, 7,8) Listed were a Dr. Mendenhall, the physician treating Mrs. Jones' fracture, and a Dr. MacDonald, an internist. Further, the very denomination of the parties claims the incompetence of Mrs. Jones. The record of evidence at trial, however, is devoid of proof that there has been a judicial determination of Mrs. Jones' incompetence. Paragraph 2 of respondent's Complaint alleges, and was admitted by appellant, that application had been made to the District Court of Salt Lake County for appointment of a conservator. But the evidence at trial was that the appointment had been denied. (T 54,73) Bonnie Shiner appeared as Guardian Ad Litem for Mrs. Jones based on an ex-parte application alleging Mrs. Jones' incompetency by reason of "mental deficiency, loss of memory, physical illnes or disability and advanced age." The application is dated May 29, 1981. It is endorsed by the alleged incompetent Mrs. Jones who nominates Bonnie Shiner therein as her guardian ad litem. Mrs. Jones appeared and testified at the trial. (T 10-33) Respondent, it appears, has taken an inconsistent postion in the trial as to the issue of Mrs. Jones' competency generally. If she, indeed, as the Petition for Appointment as Guardian Ad Litem would indicate, was mentally incompetent on May 29, 1981, and suffered from loss of memory, what was her competency to be a witness in this case on December 8, 1981? Utah Code Anno. (1953) §78-24-2 states:

"WHO MAY NOT BE WITNESSES.--The following persons cannot be witnesses: (1) Those who are of unsound mind at the time of their production for examination. * * *"

Reading of the evidence produced by respondent shows that respondent would have it accepted that Mrs. Jones was competent as of December 8, 1981, when she testified at the trial since respondent's arguments placed heavy reliance on the testimony of Mrs. Jones as to the events of March 3, 1978, but the whole thrust of respondent's case is to attempt to show that Mrs. Jones was incompetent while in the hospital and again within a year thereafter. It is only from the allegations of paragraph 2 of the Complaint and the denomination of the parties that the incompetency of Mrs. Jones, generally, can be inferred. While that is not the crucial issue in the case, respondent's attempt to infer incompetency on March 3, 1978, from the foregoing may be questioned and, on review, falls short of such inference.

As to the specific factual issue of the case, Mrs. Jones' competency on March 3, 1978, both parties offered evidence.

Mrs. Jones testified, in essence, that she signed the deed at her daughter, Millie Colby's request, without explanation from Millie Colby as to the nature of that document. (T 15, 16) Mrs. Jones testified that she later discovered the fact of the deed when she attempted to sell the house. (T 16) Contrary testimony was given by Defendant/Appellant's witness, Harold Harmer, the Administrator at Mountain View Hospital, and the Notary Public whose signature appears on the March 3, 1982, deed. Mr. Harmer testified to his practice in relation to

notarization of patients' signatures on documents while in the hospital:

> A: It was always my practice to review the document that they were signing and ask them if they understood thoroughly what they were signing. And whenever I did and could I advised them that this may or may not hold up in court. But I did want them to know how serious the document was. (T 75)

Mr. Harmer further testified:

> Q: (By Mr. Anderson, Defendant/Appellant's trial attorney) OK. Alright. Now, do you recall talking with Trilba Jones about this deed?
>
> A: Well, I couldn't list any specifics that I might have told her; but I recall doing this, everytime that I ever notorized a document of this nature, that I went through it thoroughly with the patient to see if they understood. (T 75 - 76)
>
> * * *
>
> A: And I couldn't remember any details. But, no, I do not remember that she seemed confused or did not understand. If that had of[sic] been the case, I would not have notorized her signature if she had not understood what I was telling her. (T 78)

On cross examination by Mr. Ables, Plaintiff/Respondent's attorney, Mr. Harmer testified:

> Q: Well, you review the document, anyhow, before the person signs it?
>
> A: I review it with the patient. I take, I sit there by the bed and review it with the patient and tell them what they are signing, that this is a deed, that you are deeding a home, and -- (T 79)
>
> * * *
>
> Q: Then you tell them also about how serious the document is, is that, you testify to that?
>
> A: Well, I told them that they were deeding, that she was deeding her home.
>
> * * *

In other words, was it your testimony here that Mrs. Jones was not confused at the time you had her sign this deed?

A: I don't believe that she was. If she were, I question that I would have gone ahead with the notorization of her signature. (T 80)

Further evidence contrary to the testimony of Mrs. Jones was given by Defendant/Appellant's witness, Anita Lynn Luke, a registered nurse who witnessed the deed:

A: I recall that Mr. Harmer asked her questions, and she seemed to answer intelligently.

Q: And you were satisfied as a witness?

A: Yes they[sic] she knew she was signing. (T 84)

The very denomination of the case name and the allegation of incompetency in the Petition for Appointment as Guardian Ad Litem, stating that Mrs. Jones was mentally deficient and sufferred from loss of memory tend to impeach the evidence offered by the respondent as to the value of Mrs. Jones' testimony at trial. The test to determine, in the context of a deed, the competency of the signer is set forth in Peterson v. Carter, 579 P.2d 329 (Utah 1978), at 331:

> "The test whether grantor has sufficent mental capacity to make a deed is: Were mental faculties so deficient or impaired that there was not sufficient power to comprehend the subject of the deed, its nature and its probable consequences, and to act with discretion in relation thereto, or with relation to ordinary affairs of life?"

The evidence offered by the respondent to, positively, prove the incompetency of Mrs. Jones on March 3, 1978, fails to meet the burden of proof required. Aside from her statements "just a paper--sign it," the respondent offered only scant reference to the medical record and the conclusory observations of Bonnie Shiner. (T 45)

The testimony of Mrs. Jones at trial, if she was, indeed, competent, is subject to question for it is, overwhelmingly, self-serving. If it is accepted, she would again hold title to the property. Cross-examination disclosed more memory of the circumstances of signing. Mrs. Jones was questioned as to the visit of a Provo attorney, Mr. Ronald Stanger, concerning the drawing up of a deed while she was at the hospital. At first Mrs. Jones did not recall his visit but later admitted signing a check in payment (T 26) and the visit:

> Q: All right. Do you remember him talking to you about drawing up a deed and you paying him this check?
>
> A. Yes. (T 27)

On redirect examination Mrs. Jones disclosed:

> Q: And so it was your idea then to go ahead and to deed the property away to Millie?
>
> A: Yes, but Millie's dead now. (T 29)

Apparently not satisfied with the foregoing answer, respondent's counsel continued:

> Q: Well, that doesn't make--Was it your idea to go ahead and give ti to her?
>
> A: I don't remember nothing, Wendell. I knew Millie would make it. (T 29)

Mrs. Jones then continues to rely on her present lack of memory. (T 30) But, on recross, the following was stated:

> Q: Mrs. Jones, now, Millie is dead now?
>
> A: Right.

Q: That's right. And isn't it true that you gave her the house and that you wanted her to have the house, but now that she's dead you want it back; is that right?

A: That's correct.

In Controlled Receivables , Inc. v. Harman, 413 P.2d 807, at 810, the Court, referring in note 9 to Allen v. Allen, supra, stated:

> " * * * this court observed that the facts were consistent with forgetfulness or misunderstanding of the legal effect by the grantor of what she did or with a change of mind or desire at a subsequent date, but that they were not necessarily probative of a knowledge that she did not convey or did not intend to convey her land at the time."

Appellant, too, offered evidence of the competency of Mrs. Jones before and after the accident: Mrs. Jones lived alone in the Nephi house both before hospitalization (T 11) and after release for over a year (T 22); that she had employment as a baby-sitter before the accident (T 21) and could even care for a retarded child (T12); that after the accident she took and passed a driver's license examination and resumed driving her car (T 22).

While not made a specific finding, the appellant stipulated at pre-trial hearing that no cash consideration was given for the Jones to Colby deed. But that does now exclude that there was non-cash consideration. The record indicates that Millie Colby, after the hospitalization of Mrs. Jones, continued to be supportive of her and that Mrs. Jones had come to expect that. (T 28) In Jordan v. Jordan, 445 P.2d 765 (Utah 1968) at 766, this Court has stated: " * * * love and affection and the ensuing actions of parties represented good consideration

Further, as to the point of lack on consideration for the Jones to Colby deed, no citation to case law is required to support the position that property may be transferred by gift alone.

B.

LACK OF TRILBA JONES' INTENT TO TRANSFER THE PROPERTY TO THE EXCLUSION OF HER RIGHTS AND THE RIGHTS OF HER OTHER HEIRS THEREIN

The finding is made by the Court that Mrs. Jones did not intend, by the deed of March 3, 1978, to grant title to Millie Colby to the exclusion of her own rights and the rights of others. The finding, in effect, is an alternative hypothesis by the Court and challenges the findings of Mrs. Jones' incompetency and lack of knowledge. That she intended to "give the property to Millie" is supported by quotations from the transcript, supra. That this necessarily would affect her rights therein is apparant. The problem in analyzing the trial court's reasoning is that this position is inconsistent with the findings previously discussed. If Mrs. Jones was incompetent or if she did not know what she was doing, then the transfer is void. The instant finding must rely on the assumption that Mrs. Jones <u>was</u> competent and <u>did</u> know what she was doing, but that she did the act of signing the deed for some other purpose than delivery of title. Such a position is not supported by the record. Mrs. Jones offered no such testimony. Respondent attempted to use the testimony of Mairiam Winn, a granddaughter of Mrs. Jones, to support some type of informal trust arrangement but that testimony was ordered stricken by the Court. (T 71)

Further testimony was offered trhough Mairiam Winn that Millie Colby would deed the property back to a conservator for Mrs. Jones. (T 67,68) This testimony is of no value in supporting the finding by the Court. It is, if accurate, only a representation of Millie Colby's then state of mind and not the intent of her grantor. Further, it was based on the premise that there would be a conservatorship--which was never completed. (T 54,73) It cannot be used to infer the mind of Trilba Jones on March 3, 1978.

That a deed can be construed in some way as will runs counter to the presumption in favor of the validity and recordation of instruments of conveyance. Jordan v. Jordan, supra.

The Court's finding is further without support in that it presupposes some specific intent of Mrs. Jones concerning the house in question. The 1965 will of Mrs. Jones was introduced by respondent, apparantly to show a "share and share alike" intent on the part of Mrs. Jones. (Exhibit 7) A "Statement Giving Power of Attorney" dated February 23, 1978, contains similar language but no specific mention of the house and property. Exhibit 9) The record contains mention of other property of Mrs. Jones in the form of bank accounts, a note receivable, etc. (T 41, 55) That testamentary documents are as transitory as the prior disposition of property make them is universally accepted. The testator may exclude certain property from equal division distribution among his heirs either by making specific bequests, gifts or devises in the will itself or by making other disposition outside of the will which negates equal distribution of his estate. In fact, the effect of transfer by deed is to keep

property out of the estate per se. And, that one may change one's mind by subsequent, contrary act is inherent in the law of wills.

C.

THE DEED OF MARCH 3, 1978, WAS THE PRODUCT OF DURESS EXERCISED BY MILLIE COLBY ON TRILBA JONES

The Court found that duress was employed by Millie Colby on Trilba Jones to obtain the March 3, 1978, deed. The testimony of respondent's own witness, Mairian Winn, indicates otherwise. She testified that the idea for the deed originated in the mind of Trilba Jones. (T 68, 69) That evidence is contrary to the position that duress was the cause of the deed since duress assumes the forcing of the will of Millie Colby on Trilba Jones and not vice-versa.

The evidence apparantly produced by respondent for support of this finding is contained in the testimony of Mrs. Jones, herself. It is subject all of the questions that are raised, supra. It is significant here, as there, that Mrs. Jones repeatedly stated: "I don't know what I done." (T 30) Mrs. Jones, however, on direct examination did admit, as discussed, supra;

> Q: And so it was your idea them to go ahead and deed the property to Millie?
>
> A: Yes, but Millie's dead now. (T 29)

Evidence that was, apparantly, offered as prelimary to show duress was offered by Bonnie Shiner (T 39-47) but was objected to (T 39, 48) and ruled as inadmissible.(T 48) As a result, the respondent did not produce evidence to support the

D.

PERSONS WITH A FIDUCIARY DUTY TO TRILBA JONES FAILED IN THE DUTY TO INFORM HER OF THE DEED OF MARCH 3, 1978

The court makes a finding which, in its terms, may apply, to parties other than the appellant's predeceasor in interest, Millie Colby. Does this finding mean that the Notary Public before whom Trilba Jones signed the deed in question failed to inform her of its import? Or that the hospital personnel, generally failed to protect her interests? Appellant's search of the Utah Code and decisional law fails to show such a duty. The only "person"to whom the finding could refer is Millie Colby.

The testimony of Trilba Jones was that she discovered the existence of the March 3, 1978, deed only when she attempted to sell the subject property. (T 16) The discussion, supra, is replete with references to and comments on the testimony of Trilba Jones with respect to her memory at trial of prior events and the purposes she may have had in so testifying and will not be repeated here but has parallel application to this argument. It is the appellant's position that Trilba Jones did know of the deed at the time of its execution and that this finding, based on a position to the contrary, is without basis in the evidence when the evidence is taken as a whole.

The law concerning confidential relationships is well established in Utah decisional law. In Bradbury v. Rasmussen, 401 P.2d 710 (Utah 1965), the heirs of the decedent attacked a deed granting property which otherwise would have passed on the decedents death wherein a non-heir received the property. The grantee was a person raised as a family member by the decedent grantor and his

wife, a party to the suit. At 713 the Court stated:

> "The evidence is undisputed that there existed among the parties [to the deed] sincere affection, trust and confidence, but is this legally sufficient to constitute a confidential relationship giving rise to a presumption that the transaction was unfair? We think not.
>
> The mere relationship of parent and child does not constitute evidence of such confidential relationship as to create a presumption of fraud or undue influence. While kinship may be a factor in determining the existence of a legally significant confidential relationship, there must be a showing, in addition to kinship, a reposal of confidence by one party and the resulting superiority and influence on the other party."

In Bradbury the Court found that no such relationship existed. In that case, as here, there was intervention by an attorney. Bradbury further states the law as:

> "The confidence must be reposed by one under such circumstances as to create a corresponding duty * * * and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other."id.

The appellant argued, at trial, that such a relationship was not established by the facts. While there was a Power of Attorney created, the evidence fails to show that the deed in question was executed by Millie Colby under that power. Rather, it bears the name of Trilba Jones and, according to testimony from both parties' witnesses, including Trilba Jones, herself, was the idea of Trilba Jones. There was testimony that Millie Colby aided Mrs. Jones in her financial matters but the evidence discloses only situations where checks were prepared for household expenses of Mrs. Jones but the signature thereon was always that of Mrs. Jones. Such is not the "substitution of the will of

one over another.

But, assuming, arguendo, that such a relationship may be reasonably found from the evidence, was there a breach of its duties by the superior party in the execution of the March 3, 1978, deed which should result in its invalidity? The Court, in Peterson v. Carter, supra, at 331, ruled: "[Undue influence] must be shown by clear and convincing evidence that the grantee exercised a dominating influence over the grantor." The evidence proponderates to the appellant in this question.

E.

THE TRANSFER TO APPELLANT BY MILLIE COLBY WAS WITHOUT CONSIDERATION

The appellant admitted that she was not a bona fide purchaser for value. Appellant further, however, asserted at the pre-trial hearing and showed in the trial that she had received the subject property by gift from her mother, Millie Colby. That position, per se, does not invalidate her claim so long as the claim of Millie Colby is determined valid. See Jordan v. Jordan, supra.

II

THE COURT ERRED IN REFUSING APPELLANT'S MOTION FOR NEW TRIAL BASED ON GROUNDS OF SURPISE BASED ON THE TESTIMONY OF THE RESPONDENT'S WITNESS, MAIRIAM WINN

The respondent's intent to call Mairiam Winn as a witness in her case in chief was not disclosed at the pre-trial hearing. Her testimony was objected to on grounds amounting to surprise

on the raising of a new issue. (T 69,70) The court overruled the objection and allowed the testimony. After trial the appellant filed her Motion for New Trial, supported with affidavits of her former counsel, Mr. Gary Anderson, and Clint Colby, a witness sought to be called in rebuttal to the testimony of Mairiam Winn. That motion was denied by the Court. Rule 59, Utah Rules of Civil Procedure, provides that " * * * a new trial may be granted on * * * all or part of the issues, for any of the following causes; provided that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additonal testimony * * *: (3) Accident or surprise, which ordinary prudence could not have guarded against." The issue in question was the establishment of a trust or other fiduciary relationship which was not plead in the Complaint or established as an issue at the pre-trial hearing (Transcript of Pre-Trial Hearing, 9) without objection from appellant. Denial of the Motion for New Trial, under the circumstances of the findings actually made by the Court, cannot be considered "harmless error." Del Porto v. Nicolo, supra, at 814.

III

THE COURT ERRED IN INCLUDING IN THE TRIAL EVIDENCE AS TO A FIDUCIARY RELATIONSHIP

At pre-trial conference in this case appellant's counsel ojected to the issue of fiduciary relationship being included as an issue in the trial. (Transcript of Pre-Trial Hearing, 9) Further, appellant objected to the introduction of evidence in

relation to that issue (T 69, 70) The Court overruled both the objection at pre-trial and at trial. The appellant asserts this is error since the issue in question was not framed by the pleadings and therefore not rightly before the Court. This is not "harmless error" since the Court entered a specific finding on this very issue.

The law is clear that not all error is grounds for reversal, especially in a non-jury trial. In Del Porto v. Nicolo, supra, at 814, the Court stated, that in non-jury trials " * * * the trial judge has superior knowledge as to the competency and effect which should be given evidence, and that he will make his findings and decision in conformity therewith." The inquiry to make, the Court continued, " * * * is whether there was error of a sufficiently substantial nature that it is reasonable to believe that it adversly affected the appellant or deprived him of a fair trial in such a way that in the absence of such error there is a reasonable likelihood that the outcome would have been different." id. In an appeal of a decison of the District Court sitting as a court in equity, the reviewing powers of the Supreme Court are heightenedd in this area.

Appellant asserts that the error was reversible and, at least, the case should have been reopened for rebuttal testimony.

CONCLUSION

The appellant asserts that the evidence, taken as a whole, does not support the findings in favor of respondent made by the trial court and that the judgment should be vacated and re-

versed. In the alternative, the appellant asserts that the trial Court committed reversible error in admitting the testimony of Mairiam Winn concerning a fiduciary relationship between the parties over the objection of appellant's trial counsel.

RESPECTFULLY SUBMITTED this 26th day of July, 1982.

ROBERT J. SCHUMACHER
Attorney for Appellant
81 East Center Street
Provo, Utah 84601

DELIVERY CERTIFICATE

I certify that two true and correct copies of the foregoing Appellant's Brief were, this 26th day of July, 1982, served upon Mr. Wendell P. Ables, Respondent's Attorney, at his office, Suite 14, Intrade Building, 1399 South Seventh East, Salt Lake City, Utah 84105.

ROBERT J. SCHUMACHER